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SUPREME COURT, U.S.
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No. 94-149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RESOLUTION TRUST CORPORATION,
Petitioner,

v.

HOMELAND STORES, INC.,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the administrative claims process of 12 U.S.C. §1821(d) is restricted to claims of creditors of an insolvent depository institution arising before the notice given by RTC under §1821(d)(3)(B), or also applies to a claim arising from RTC's breach of duty in its management of receivership assets after its appointment as receiver.

2. When RTC as receiver fails to repudiate an unexpired lease under 12 U.S.C. §1821(e)(1) and then breaches the lease after expiration of the time for submission and processing of virtually all creditor claims, must the other party to the lease submit to the 180-day administrative claims process under 12 U.S.C. §1821(d) before seeking monetary relief in a district court action?

3. Whether the Tenth Circuit's affirmance of the district court's denial of RTC's motion to dismiss respondent's complaint is correct on the alternate ground that respondent is entitled to seek an injunction to prevent the breach of its lease, notwithstanding 12 U.S.C. §1821(j), since RTC's breach is not the exercise of a basic receivership power or function.

PARENTS/SUBSIDIARIES OF CORPORATE RESPONDENT

Respondent Homeland Stores, Inc. is a wholly owned subsidiary of Homeland Holding Corporation, a Delaware corporation. Respondent Homeland Stores, Inc. has no subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADDITIONAL STATUTORY PROVISIONS INVOLVED

The following additional provisions of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA") are relevant, and are reproduced in respondent's Supplemental Appendix ("Supp. App.") at 1a-4a: 12 U.S.C. §1821(d)(10); §1821(e)(1),(2),(3) and (5); and §1821(j).[1]

STATEMENT OF THE CASE

RTC's interlocutory appeal is from denial of its motion to dismiss the complaint of respondent Homeland Stores, Inc. ("Homeland") under Fed.R.Civ.P. 12 (b)(6). RTC App., 17a, 31a.[2]

Homeland is a retail grocery business and owns a store in a Parsons, Kansas shopping center under a lease made nearly 20 years ago. With renewal options

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[1] Statutory references are to 12 U.S.C. unless otherwise indicated.

[2] In the process of deciding that motion, the district court rejected RTC's additional jurisdictional arguments, as discussed below.

the lease would extend another 32 years. Homeland recently made more than $700,000 in capital improvements to the property, before learning of the breach by RTC complained of in this action.[3]

The lease requires the lessor to maintain a specifically identified attractive anchor tenant in an adjacent area nearly twice the space as Homeland's, and if the anchor tenant cancels its lease to seek Homeland's approval of a substitute similar tenant. After the anchor tenant cancelled and RTC succeeded to the position of lessor, RTC instead leased the anchor tenant space to another grocery business, Bob's Super Saver, Inc. ("Bob's") without consulting Homeland. RTC App., 2a; Supp. App., 2b-3b, ¶¶ 11 and 13.

RTC had no doubt it was breaching Homeland's lease, and even accepted additional consideration conditioned on driving Homeland from the shopping center. RTC attached Homeland's lease to Bob's lease so that it could be referenced in a clause excluding it from warranties that RTC was breaching no other tenant's lease. Supp. App., 3b, ¶¶ 18 and 19. RTC contracted for nearly triple the rent Bob's would otherwise owe if Homeland left the shopping center. In the event Homeland was successfully driven out RTC promised not to lease any property within 5 miles of the shopping center to Homeland again. Supp. App., 3b-4b, ¶ 21.[4]

RTC also promised Bob's not to lease to any additional grocery business. RTC agreed that Bob's could obtain injunctive relief against RTC if it breached any of these exclusivity provisions of the lease.[5]

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[3] The capital improvements were not specifically alleged but were asserted by Homeland in briefing without dispute both in the district court and Tenth Circuit.

[4] Before doing all of this, RTC did not inquire whether Homeland wanted the anchor tenant space for itself.

[5] RTC's Tenth Circuit App. at 49, Article 12 of Bob's Lease.

After RTC was appointed receiver it could have disaffirmed Homeland's lease under §1821(e)(1). Supp. App., 1a-2a. This would have allowed RTC to lawfully lease to Bob's, and would have given Homeland an immediate claim for damages under §1821(e)(3) and (5). Supp. App., 2a-4a. However, RTC voluntarily assumed the obligations of the lease, then waited more than a year (while Homeland continued to perform and improve the property) before breaching it.[6] RTC made its lease with Bob's fifteen months after it had published its last notice under §1821(d)(3)(B) to "creditors."[7] Creditors have 90 days after the notice to make claims against the receivership. Indeed, the 180 days allowed to *process* "claim[s]" against the receivership assets[8] had already expired six months before RTC breached Homeland's lease. Further, RTC never gave Homeland the mandatory statutory mailed notice owing to any "claimant" under §1821(d)(3)(C)(ii). RTC App. 46a, 25a.

Homeland learned of RTC's lease to Bob's and brought this action against both of them to enjoin them from carrying out the lease. RTC App., 16a. Homeland did not expressly request any money damages from RTC on account of the lease to Bob's; it sought only an injunction.[9] RTC and Bob's both filed motions to dis-

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[6] As to RTC's assumption of the lease, *see* RTC App., 25a and 38a.

[7] Homeland sued RTC as receiver of Mid Kansas Federal Savings and Loan Association and First Federal Savings and Loan Association of Coffeyville, Kansas. Supp. App., 1b, ¶ 2. The last notice to creditors of these institutions is December 22, 1989. Supp. App., 1c-2c, ¶¶ 5 and 10. Bob's lease was made March 22, 1991. RTC's Tenth Circuit App. at 43.

[8] Section 1821(d)(5)(A)(i), RTC App., 48a.

[9] Thus, RTC's statement at p.4, ¶3 to the contrary is incorrect. The district court opinion even reveals this. RTC App., 16a-17a, 21a-22a. Homeland did seek damages for failure of RTC to repair the parking lot. An unjust enrichment claim was also made but withdrawn. RTC App. 17a, 22a.

miss under Fed.R.Civ.P. 12(b)(6) (RTC App., 17a).[10] Contrary to RTC's position here, RTC relied in its district court motion on notices it gave to creditors of the financial institutions for which it is receiver, attaching an affidavit showing the publication of notices to creditors and that Homeland had presented no claim. Supp. App., 1c-3c.

The district court denied both motions to dismiss. The court concluded it was rendered powerless by §1821(j) (Supp. App., 4a) to enjoin the performance of Bob's lease regardless of any alleged threat of irreparable injury to Homeland. RTC App., 18a-21a, 30a-31a.[11] However, the court reasoned that Homeland's claim should not be dismissed if Homeland was entitled to monetary relief, since Homeland's prayer had requested whatever relief the court found appropriate. RTC App., 22a. The court held that "RTC has assumed the contract and has stepped into the shoes of the lessor." RTC App., 25a. The court agreed with other authority[12] that when RTC fails to exercise its statutory right to repudiate a lease under 12 U.S.C. §1821(e)(1), RTC effectively assumes the obligations of the lease. RTC App., 39a. The court held RTC's voluntary assumption of the lease made the exhaustion requirement inapplicable, since Homeland's complaint that RTC failed to act on the lease in good faith was not a creditor claim within the purposes of FIRREA. RTC App., 38a-39a. Bob's motion to dismiss was also denied. RTC App., 31a-32.

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[10] RTC moved to dismiss the claim to enjoin performance of Bob's lease under §1821(j). RTC App., 17a-18a; Supp. App., 4a. RTC moved to dismiss the damages claim for failure to repair the parking lot on the ground that Homeland failed to exhaust administrative remedies. RTC App., 26a.

[11] The court's analysis is found in two opinions, the second one on cross-motions for reconsideration. RTC App., 15a, 33a.

[12] *RTC v. United Trust Fund, Inc.,* 775 F.Supp. 1465, 1469 (S.D.Fla. 1991); *Rechler Partnership v. RTC,* 1990 U.S. Dist. Lexis 18714 (D.N.J. 1990).

RTC was granted the necessary certification to pursue an interlocutory appeal under 28 U.S.C. §1292(b). The district court declined to include the question of whether injunctive relief was available in its certification order. However, on appeal Homeland argued that since only an *order* (rather than an issue) is certified for appeal, the availability of injunctive relief should be reached as a controlling issue to determine whether the complaint may be dismissed. The Tenth Circuit agreed in principle, but held that since it agreed with the district court that Homeland was entitled to monetary damages, there was no need to address whether injunctive relief was also available. RTC App., 5a.

The Tenth Circuit found the FIRREA exhaustion procedures inapplicable to claims against the RTC arising from RTC's own conduct, *vis a vis* "creditor" claims grounded in the acts or omissions of the failed institution. The court noted the relatively short deadlines for making and processing claims against the receivership. RTC App., 10a. The court held: "Obviously, claims such as Homeland's arising after receivership and in the indeterminate future due to management actions of the RTC cannot have been contemplated when such deadlines for filing administrative claims were set." RTC App., 11a. After reviewing various other provisions of the exhaustion procedure and the reasoning of decisional law,[13] the court concluded that §1821(d)(13)(D) does not apply to claims like Homeland which arise due to RTC action in managing an institutional asset after an institution enters receivership. RTC App., 6a-14a.

On March 1, 1994 – six days *after* the Tenth Circuit rendered its opinion in this case – RTC adopted the "Interim Statement" which it references at p.9, n.7 of its Petition, containing policy statements

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[13] Homeland discusses the Tenth Circuit's reasoning in argument, Part V.

very much like its rejected arguments in briefing before the Tenth Circuit, broadly interpreting the FIRREA exhaustion procedures to apply to, *inter alia*, "any claim based upon an act or omission of the receiver with respect to an executory agreement or unexpired lease of the institution . . . . " RTC cited and attached its newly adopted "Interim Statement" as one basis (among others) for seeking rehearing in the Tenth Circuit. The Tenth Circuit denied RTC's petition for rehearing. RTC App., 43.

RTC announced its intention to seek review by writ of certiorari in this Court. Homeland therefore sought to obviate further waste of resources on the issue by presenting an administrative claim, as RTC notes in its footnote 9. That issue is discussed in argument, Part II.

SUMMARY OF ARGUMENT

1. RTC seeks further interlocutory review after having failed to prevail in its 28 U.S.C. §1292(b) appeal of the district court's denial of its motion to dismiss Homeland's complaint. Homeland's action, filed July 23, 1991 against both RTC and Bob's Super Saver, remains stayed in the district court pending the conclusion of RTC's appeal. If certiorari is denied RTC may entirely prevail on Homeland's claim, or the Tenth Circuit (or the district court on revisiting the issue) may determine that Homeland can obtain the injunction for which this action was brought. Any number of additional procedural or negotiated scenarios may resolve the exhaustion issue which RTC seeks to present here. And if the issue is not resolved, RTC will be able to present it after final judgment in the case. *See* Part I, *infra*.

2. Upon RTC's announcement of its intention to present the issue to this Court, Homeland gave RTC just what it wanted: Homeland filed the administrative claim, expressly to obviate further waste of re-

sources, while emphasizing its position that both lower courts' decisions were nevertheless correct. RTC remains unsatisfied.

After more than three years of litigation RTC need not consume the full 180 days (from July 13, 1994) allowed to deny Homeland's claim, but even if it does the issue sought to be presented here is in every practical sense moot. Unless RTC fully allows Homeland's claims Homeland will seek to amend its complaint to reassert them in the pending action. This would obviate another RTC petition for writ of certiorari at the conclusion of this action if Homeland prevails.

RTC perpetuated the controversy over exhaustion in the Tenth Circuit before decision for the sole purpose of seeking favorable precedent (at Homeland's continually mounting expense). RTC openly declared in briefing to that court that it had forsaken a sale of the shopping center involved because of the prospect that other courts might follow the reasoning of the district court decision. Now RTC seeks to perpetuate the controversy further, in interlocutory proceedings, again for the sake of precedent – not for concern with the economic interests involved in this case. *See* Part II, *infra*.

3. The Tenth Circuit's opinion does not take into account RTC's "Interim Statement" cited in its Petition at 9, n.7, because RTC adopted the Interim Statement *after* the issuance of the court's opinion. While the Tenth Circuit properly did not grant rehearing on the basis of the post-decisional Interim Statement, in future cases RTC will be able to rely upon its argument, based on the new Interim Statement, that RTC's policy is to process post-takeover claims for breach of an assumed executory contract or unexpired lease, and that the statute should therefore be construed to require exhaustion of these procedures. RTC may make the same contention in this Court if it fails to

prevail in a future case addressing the issue. Since the timing of the adoption of the Interim Statement procedurally precludes RTC's reliance upon it here, review of the exhaustion question should await a case where the Interim Statement may properly be considered. *See* Part III, *infra.*

4. The Tenth Circuit decision is correct, but even if it were not the result would be. The same result is proper on the narrower ground that RTC voluntarily assumed Homeland's executory lease by failing to exercise its unquestioned right under §1821(e)(1) to repudiate it. Other courts have reached the same result on this narrower ground. The result is also correct because Homeland is entitled to injunctive relief even if it must exhaust administrative procedures to obtain monetary relief. The Tenth Circuit found it unnecessary to address the availability of an injunction because it found Homeland's complaint should not be dismissed in any event. *See* Part IV, *infra.*

5. The Tenth Circuit's decision is a correct interpretation of §1821(d), for the reasons given in its opinion. Section 1821(d) requires the receiver to give a notice to creditors of the failed financial institution, who must within a specified time submit their claims through the administrative process before bringing an action. Not even RTC contends that Homeland was (or is) a creditor entitled to receive such notice, or that Homeland could predict RTC would decide to breach its lease before RTC had processed creditor claims. RTC urges that the administrative process applies regardless of expiration of the time for submitting and processing creditor claims, on the theory that the administrative process covers more than "creditors" — a position indefensible under the language of §1821(d) and rejected by decisional law. Finally, only two other Circuit Courts have expressly reached the issue sought to be presented by RTC. The First Circuit

initially held, like the Tenth Circuit, that exhaustion of administrative procedures was not required as to the receiver's own post-takeover conduct after expiration of the bar date in notices to creditors[14] – then on rehearing revised its opinion (but not the result in the case) based on FDIC's argument that its internal procedures allowed processing of such claims after the creditors' bar date.[15] RTC urges that its post-decision Interim Statement is similar to FDIC's internal procedures. The First Circuit would have decided this case like the Tenth Circuit, since there was no Interim Statement at the time of appellate decision. Moreover, other Circuits do not defer to an agency's views on the scope of statutory jurisdiction of the courts. Only the Third Circuit has otherwise addressed the exhaustion issue contrary to the Tenth Circuit, as noted in the Tenth Circuit's opinion.[16] However, the Third Circuit in *Rosa* did not discuss the question of availability of the claims process, and a subsequent decision by the Third Circuit suggests that the court would find it unconstitutional to withhold jurisdiction from a claimant in Homeland's circumstances providing the Tenth Circuit was correct in concluding that Homeland's claim could not be timely presented in the administrative claims process.[17] *See* Part V, *infra*.

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[14] *Heno v. FDIC*, 996 F.2d 429 (1st Cir. 1993).

[15] *Heno v. FDIC*, 20 F.3d 1204 (1st Cir. 1994).

[16] RTC App., 14a, citing *Rosa v. RTC*, 938 F.2d 383, 392 (3d Cir.), *cert. denied*, 116 L.Ed.2d 608 (1991).

[17] *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110 (3rd Cir. 1994).

ARGUMENT AND AUTHORITIES

I. ANY REVIEW OF THE INTERLOCUTORY DECISION OF THE COURT OF APPEALS SHOULD BE DEFERRED PENDING FINAL JUDGMENT

The Tenth Circuit's decision affirming the district court's denial of RTC's dismissal motion is on an interlocutory appeal under 28 U.S.C. §1292(b). Upon remand Homeland's claims against both RTC and Bob's will be tried, and if RTC prevails, the question sought to be presented here will become moot. Or, the district court might reconsider its opinion that it lacks authority to enjoin performance of the lease to Bob's, and damages for that claim may become unnecessary. Or, the parties may negotiate a settlement. Or the district court may permit Homeland to amend its complaint to reassert the same monetary claims against RTC after RTC denies Homeland's administrative claim. *See* Part II, *infra*.[18]

Assuming the issue is not otherwise resolved, RTC may petition for writ of certiorari after final judgment. "Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial." Stern, Gressman, *et al.*, SUPREME COURT PRACTICE §4.18 at p.198 (7th Ed. 1993).

Where further proceedings after remand from a Court of Appeals are required, an issue decided by the remanding court is not deemed ripe for this Court's review. *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967). The exception cited by RTC applies only when the Court of Appeals' ruling "is fundamen-

[18] Similarly, if RTC grants the claim the need for further review will be unnecessary.

tal to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).[19] The Solicitor General's position since 1980 has been that even in *criminal* cases, in interlocutory appeals "judicial efficiency would be better served by deferring review until rendition of final judgment, so that all claims can be presented in a single petition if, in fact, the defendant is convicted." Stern, Gressman, *et al.*, SUPREME COURT PRACTICE §4.18 at p.196 n.60 (7th Ed. 1993).

Judicial efficiency would be better served here by awaiting final disposition of Homeland's claims in the trial court, where the issue may be resolved (particularly now that an administrative claim has been presented – the issue next addressed).

II. HOMELAND HAS NOW PRESENTED AN ADMINISTRATIVE CLAIM, THUS ELIMINATING THE CONTROVERSY OVER THE NEED FOR EXHAUSTION

In oral argument before the Tenth Circuit one of the first questions asked was why Homeland had not obviated appellate review by presenting an administrative claim. Homeland's counsel explained that it had sought only injunctive relief to prevent RTC's performance of Bob's lease.[20] Until the district court denied RTC's motion to dismiss that claim on the ground that Homeland could obtain alternate monetary relief, the exhaustion issue had been relatively unimportant.

After the Tenth Circuit's decision RTC apprised that court of its intention to seek a writ of certiorari in

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[19] In the two cases cited by RTC at 12, the Court of Appeals' decisions determined how the cases would be tried on remand, since either this Court or the Court of Appeals held the outcome on the appealed issue dependent on decision of the merits. *Land v. Dollar*, 330 U.S. 731, 735 (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 (1947). Here, any need for exhaustion does not depend on what Homeland proves at trial.

[20] Damages were sought only for failure to keep the premises in repair.

this Court. Since if a writ of certiorari was granted further review would likely consume more than the maximum 180 days allowed to process an administrative claim,[21] Homeland presented one on July 13, 1994. The claim was expressly for the sole purpose of preventing further waste of the resources of the parties and the courts, and did not concede any legal question. If presenting the claim avoids further delay it may allow adjudication of Homeland's claim before RTC further depletes whatever assets may remain of the insolvent savings and loan associations, so that Homeland will have some hope of more than a nominal remedy.

RTC relegates discussion of Homeland's administrative claim – for the sake of which RTC prosecuted the interlocutory appeal and seeks further review here – to a footnote just prior to the conclusion of its petition. RTC asserts that the case is not moot unless Homeland dismisses its complaint, in which event RTC says it will seek vacation of the judgment and remand with directions to dismiss, citing *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

This misunderstands the practical effect of Homeland's submission of the administrative claim. Even if certiorari was granted and RTC prevailed, the 180-days allowed for the administrative claims process would have expired before any remand to the district court.[22] Assuming RTC's denial of Homeland's administrative claim, Homeland could amend its complaint to assert the same claims now pending against RTC in the current action against RTC and Bob's Super Saver. Indeed, in a case like this, where RTC has never given the requisite statutory notice to engage the adminis-

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[21] *See* Section 1821(d)(5)(A)(i). RTC's App., 48a.

[22] Homeland presented its administrative claim on July 13, 1994. The 180 days will expire on January 9, 1995.

trative process to begin with,[23] even if the case was immediately remanded the district court could continue the stay currently in effect pending completion of the administrative process in order to allow such an amendment.[24]

Further, RTC is wrong in suggesting that dismissal of Homeland's complaint is required if RTC prevails on the exhaustion issue. This interlocutory appeal is from the denial of RTC's motion to dismiss Homeland's complaint. In deciding that question, the Tenth Circuit held it did not need to determine the availability of injunctive relief because it agreed with the district court's conclusion that Homeland could obtain damages (RTC's App., 5a). The injunction issue remains open, not only in the Tenth Circuit, but also in the district court.[25]

Nor is the rule of *Munsingwear* relevant in an interlocutory appeal. The general practice on an interlocutory appeal is to dismiss a moot appeal and remand where further proceedings are required.[26] That is the posture here, since mootness as to the

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[23] Section 1821(d)(3)(C)(ii) requires RTC to give a "claimant" (which is used synonymously with "creditor" in the statute) mailed notice within 30 days after discovery of the claimant's name and address. RTC App., 46a.

[24] *See Topolnycky v. Ukrainian Savings & Loan Ass'n,* 799 F.Supp. 36, 39 (E.D.Pa.1992) (granting stay for completion of administrative process when RTC had failed to give required mailed notice).

[25] While the district court concluded it could not grant an injunction, it emphasized its decision was limited to whether Homeland's claim should be dismissed (RTC's App., 17a and 31a). The court's opinion that injunctive relief is unavailable remains "subject to revision at any time before entry of judgment . . . ." Fed.R.Civ.P. 54(b). *See generally* 10 Wright, Miller and Kane, Federal Practice & Procedure §2660 at p.117 and n.4 as to authority of trial court to revise interlocutory decision before entry of judgment.

[26] *See* 13A Wright, Miller and Cooper, Federal Practice & Procedure §3533.10 at p.436; *Barrister Associates v. United States,* 915 F.2d 58, 59 (2d Cir. 1990); *Gaylord Broadcasting Co. v. Cosmos Broadcasting Corp.,* 746 F.2d 251, 254 (5th Cir. 1984); *McLane v. Mercedes-Benz of North America, Inc.,* 3 F.3d 522, 524-25 n.6 (1st Cir. 1993).

exhaustion issue does not determine the viability of Homeland's complaint. Mootness as to the exhaustion issue does, however, make further litigation over that issue a waste of resources.[27]

This is not the first time RTC has sought to perpetuate this controversy solely for the sake of precedent. In answering Homeland's contention in the Tenth Circuit that RTC knew its ability to liquidate the shopping center was impaired with two grocery stores competing side by side, RTC boasted: "In this case, RTC-Receiver could have sold the shopping center, but held it back in order not to risk mooting this appeal."[28]

III. ANY REVIEW OF THE ISSUE SOUGHT TO BE RAISED SHOULD AWAIT A CASE WHERE RTC'S NEW "INTERIM STATEMENT" MAY BE PROPERLY CONSIDERED

RTC relied in its petition for rehearing before the Tenth Circuit, and now relies here in its petition for writ of certiorari on its new "Interim Statement" that it views the administrative claims process applicable to post-takeover claims, explicitly including those based on RTC's breach of an executory contract or unexpired lease. *See* RTC's Petition at 9, n.7, and RTC's *Interim Statement of Policy Regarding Procedures To Be Used With Regard to Claims Based Upon Acts or Omissions of the Receiver,* 59 Fed.Reg. 10,663 (adopted March 1, 1994, effective March 7, 1994).

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[27] The exhaustion requirement does not apply to injunctive relief. *See Rosa v. RTC,* 938 F.2d 383, 394-95 (3rd Cir.), *cert. denied,* 116 L.Ed. 2d 608 (1991).

[28] Reply Brief of Appellant RTC filed in Tenth Circuit in this case on September 14, 1993, p.9, n.11.

The Interim Statement was adopted six days after the Tenth Circuit issued its decision. RTC relied on the Interim Statement in its petition for rehearing, but the Tenth Circuit properly did not grant rehearing to consider whether RTC's newly adopted interpretation would change the previous result.[29]

In *Heno v. FDIC,* 996 F.2d 429 (1st Cir. 1993), relied upon in the Tenth Circuit opinion (RTC App., 12a), the court reached a conclusion similar to the Tenth Circuit's, then changed the opinion on rehearing because of an internal agency manual of FDIC allowing FDIC to administratively process a post-bar date claim like the one before the court. *Heno v. FDIC,* 20 F.3d 1204, 1208-10 (1st Cir. 1994). The internal agency manual had clearly been adopted *before* the court issued its opinion, since FDIC argued on rehearing that it would have relied upon it before had it understood the claim was based on contract repudiation. *Id.* at 1208. In view of the procedural posture here, the First Circuit would have decided this case precisely like the Tenth Circuit did, as discussed in argument below, Part V.

In any subsequent case where RTC argues the applicability of the FIRREA exhaustion procedures addressed by the "Interim Statement," RTC will be able to properly rely upon what will then be its *prior* interpretation of the statute as a basis for its position (although Homeland believes the result should be the same). Review of the issue RTC seeks to present here

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[29] While a party may urge on rehearing that the Court of Appeals has overlooked or misunderstood points of law or fact, this does not entitle a party to seek rehearing based upon events subsequent to the court's decision, except to cite a subsequent controlling judicial opinion. *Armster v. United States District Court,* 806 F.2d 1347, 1356-57 (9th Cir. 1986). *See* Tenth Circuit Rule 40.1 (rehearing granted "only if a significant issue has been overlooked or misconstrued by the court"). *Cf., Anderson v. Beatrice Foods Co.,* 900 F.2d 388, 397 (1st Cir.), *cert. denied,* 498 U.S. 891 (1990) (new issues may not be raised on a petition for rehearing); *Dean v. Dean,* 837 F.2d 1267, 1268 (5th Cir. 1988) (similar). Obviously the RTC's adoption of a new "policy statement" does not qualify under these standards.

should be deferred until RTC can properly rely upon arguments based upon its new Interim Statement, since RTC regards these arguments as a sufficient basis for requiring exhaustion.

IV. THE TENTH CIRCUIT DECISION WOULD HAVE TO BE AFFIRMED ON NARROWER GROUNDS REGARDLESS OF THE ISSUE SOUGHT TO BE PRESENTED BY RTC

Determination of the question sought to be presented by RTC is unnecessary to the result in this case. While the Tenth Circuit's opinion is correct, as discussed in Part V below, the result would be correct for two alternative reasons aside from the court's holding that the exhaustion procedure is inapplicable to post-takeover management actions of RTC.

First, RTC did not simply commit a post-takeover breach of a preexisting contract in this case. As the district court observed, RTC voluntarily assumed the lease under §1821(e)(1), which allows disaffirmance by the receiver of an unexpired lease or other executory contract. Thus the narrower holding of the district court provides sufficient and independent ground for affirmance. The district court held that an action to enforce an unexpired lease voluntarily assumed by RTC was not a claim within the meaning of FIRREA. RTC App., 25a, 38a-39a.

This position is sound, is supported by other authority, and does not present the supposed conflict relied upon by RTC. The district court cited *RTC v. United Trust Fund, Inc.*, 775 F.Supp. 1465 (S.D.Fla. 1991) and *Rechler Partnership v. RTC*, 1990 U.S. Dist. Lexis 18714 (D.N.J. 1990). RTC App., 39a. In *United Trust* RTC failed to timely repudiate a lease to which it was lessee. The court held RTC thereby bound itself to the lease, determined damages against RTC payable from a letter of credit, and reserved jurisdiction to determine further damages, attorney's fees and

costs although the lessor (counterclaimant) had clearly not exhausted the administrative claims process. *Id.* at 1470. In *Rechler Partnership* the court adduced RTC's failure to repudiate an unexpired lease and the fact that plaintiff's claim for breach of the lease did not arise until "long after the expiration of the time period for filing administrative claims," in holding the administrative claims process inapplicable.

Similar rules apply under the analogous procedures of bankruptcy law:[30]

> Where a contract or lease is assumed, the estate becomes liable for performance of the whole contract or lease as if bankruptcy had never intervened, and the estate's obligations are largely determined by the contract or lease itself and by non-bankruptcy law.

8A C.J.S. *Bankruptcy* §227; *see also Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171, 175 (5th Cir. 1972) (discussing "the universally recognized rule that a trustee cannot accept the benefits of an executory contract without accepting the burdens as well."); 1 Collier Bankruptcy Manual ¶365.01 at p.365-4 (Matthew Bender 1994) ("The trustee's assumption of an executory contract operates as a complete transfer of all of the debtor's contractual rights and contractual liabilities.").

RTC's voluntary assumption of the unexpired lease in this case for the benefit of the receiverships furnishes sufficient ground for affirmance regardless of whether the claims process applies to *other* post-takeover claims arising from RTC's management actions. RTC's assumption of a lease or other executory

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[30] Courts frequently borrow from analogous bankruptcy provisions in interpreting FIRREA. *E.g., Office and Professional Employees Intern. Union, Local 2 v. FDIC*, 962 F.2d 63, 68 (D.C. Cir. 1992); *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110, at *8-9 (3rd Cir. 1994).

contract necessitates continuing performance by the other side, thus earning RTC's reciprocal performance[31] – and a normal, expeditious remedy if RTC breaches its obligations after depleting the already-insolvent receivership of its assets through the 180 day processing and payment of creditor claims.[32]

There is a second ground for affirmance, which does not concern exhaustion of administrative remedies at all. If the district court has authority to enjoin performance of Bob's lease, the relief Homeland really wants, then the district court properly denied RTC's motion to dismiss the complaint. The claims procedures do not apply to injunctive relief. *Rosa v. RTC,* 938 F.2d 383, 394-95 (3d Cir.), *cert. denied,* 116 L.Ed. 2d 608 (1991).

Indeed, if a writ of certiorari is granted in this case, Homeland urges the Court to reach the question of whether an injunction may be granted. The Court's standards prevent review of a question by certiorari "only when 'the question presented was not pressed *or* passed upon below,' . . . [and] this rule operates (as it is phrased) in the disjunctive, ..." (Emphasis supplied.) *United States v. Williams,* 118 L.Ed.2d 352, 361 (1992) (applying rule to allow review of question not pressed but passed upon). Homeland has emphatically pressed the claim for an injunction at every stage. Section 1821(j) does not give RTC a license to inflict irreparable injury by breaching any obligation it chooses so long as it is acting in a receivership capacity. Rather, §1821(j) was borrowed from a pre-FIRREA provision, then codified as §1464(d)(6)(C), which this Court held was intended to prohibit "untimely chal-

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[31] Reciprocal remaining obligations characterize an executory contract. *Gibson v. RTC,* 750 F.Supp. 1565, 1569 (S.D.Fla. 1990) (citing authorities).

[32] In contrast, a party who has rendered full performance of its side of a contract has already earned the receiver's performance, and has every reason to file a proof of claim on an unmatured or contingent claim. FIRREA regulatory claims procedure contemplates this. 12 C.F.R. §360.3(a)(7).

lenges to the receiver's appointment or collateral attacks attempting to restrain the receiver from carrying out its basic functions." *Coit Independence Joint Venture v. FSLIC,* 489 U.S. 561, 575 (1989).

V. THE TENTH CIRCUIT CORRECTLY INTERPRETED THE STATUTORY SCHEME IN A MANNER WHICH DOES NOT CREATE THE CONFLICTS SUGGESTED BY RTC

The Tenth Circuit's holding that FIRREA does not contemplate exhaustion of the administrative claims process as a prerequisite to bringing an action to assert a breach of contract committed *by RTC* in its management of a failed institution's assets after RTC's notice to creditors, and potentially after expiration of the 90-days allowed by that notice for submission of creditor claims and even the 180-days allowed to process those creditor claims, is manifestly correct.

RTC openly admits the notice provisions of FIRREA[33] are not intended to apply to a post-takeover claimant like Homeland. (The admission is not consistent with the motion to dismiss filed by RTC, the denial of which RTC is appealing. Supp. App., 1c-3c, affidavit attached to RTC's motion to dismiss relying on publication notice.)

RTC argues that FIRREA "seemingly" uses the term "creditor" in §1821(d)(3) to denote a narrower class of persons than those who may assert a "claim" under §1821(d)(13)(D). Petition at 8. Notably, this assertion is contrary to the views of the Third Circuit (upon which RTC relies for a conflict between Circuits), as discussed below.[34] More important, the statute itself quickly disposes of the assertion.

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[33] Section 1821(d)(3)(B) and (C), RTC App. 45a-46a.

[34] *National Union Fire Ins. v. City Savings, F.S.B.,* 1994 Westlaw 313110 (3rd Cir. 1994).

As the Tenth Circuit observed (RTC App., 13a), provision is made for payment of only "creditor• claims" under §1821(d)(10)(A). "Claimant" is used interchangeably with "creditor" in the notice provisions. *See* §1821(d)(3)(A) (stating the receiver may "determine claims" in accordance with subsection containing the notice provisions); §1821(d)(3)(C)(ii) (requiring receiver to give mailed notice to a "claimant" within 30 days after discovery). Further, "claims" are disallowed if filed after the bar date in the publication notice, with exceptions allowed only for any "claim filed by any claimant" who did not receive the requisite notice of the receiver's appointment. Section 1821(d)(5)(C)(i) and (ii). RTC App., 49a-50a.[35]

None of these provisions contemplate application of the claims procedure to a person who has no claim when notice is given to creditors – much less to a party rendering continuing performance under an executory contract assumed by RTC, which RTC might breach at any future date of its pleasure. Otherwise, RTC could breach an obligation after the assets of the insolvent institution were virtually depleted, then require its victim[36] to wait *another six months* while the remaining assets were being further depleted before an action could be filed.

This case is illustrative. RTC made its lease with Bob's a full fifteen months after it published its last notice to creditors, long after the 90 day period to make claims[37] and the additional 180 days to process

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[35] The exception contemplates a claimant who possessed a claim but did not receive notice, rather than a party like Homeland who had no claim at the time notice to creditors was given because RTC had not yet decided to breach its lease.

[36] RTC has with substantial success taken the position that under §1821(j) (Supp. App., 4a) it may inflict any amount of irreparable injury on any party who stands in its way, unconstrained by the threat of injunctive relief, as long as it is acting as a receiver.

[37] Section 1821(d)(3)(B)(i), RTC App., 45a.

claims.[38] RTC could have waited longer to breach Homeland's lease. RTC could have waited several years, while adjudicating all the claims against the depository institutions. It could have made a final settlement for all unsecured claims against the estate, pursuant to §1821(d)(4)(B) ("Final settlement payment procedure;" RTC App., 46a-47a) – dissipating the receivership of assets available to pay damages long before breaching Homeland's lease. It could have already paid the processed creditor claims pursuant to §1821(d)(10)(A) (Supp. App., 1a);[39] and could even have paid dividends on those claims under §1821(d)(10)(B) (Supp. App., 1a) before making the decision to breach Homeland's lease. The "fact that the receiver's assets may be depleted by interim distributions to other claimants by the time a claimant finally has access to the courts" was cited as one basis for holding that administrative remedies did not need to be exhausted under the predecessor statute to FIREA. *Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561, 587 (1989).

RTC is mistaken in arguing that because §1821(d)(13)(D)(ii) applies the exhaustion procedures to "any act or omission of such institution or the Corporation as receiver" the exhaustion requirement must apply to all claims against the receiver, whether arising before or after the notice to creditors. Claims for acts or omissions of the receiver certainly arise between the receiver's appointment and the publication of notice. An illustration is *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110 (3rd Cir. 1994) (relied upon by RTC in its Petition at 10), a declaratory judgment action to rescind insurance pol-

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[38] Section 1821(D)(5)(A), RTC App., 48a.

[39] Section 1821(d)(10)(A) allows the receiver to pay creditor claims in its discretion after they are determined either through the administrative process or through court adjudication. Supp. App., 1a.

icies issued to a savings bank under a clause automatically cancelling the policies upon appointment of a receiver.

The Tenth Circuit approvingly cited *Heno v. FDIC,* 996 F.2d 429 (1st Cir. 1993), where the court held that a claim arising after the bar date in FDIC's notice to creditors was not subject to the jurisdictional bar of §1821(d)(13)(D), and that the creditor had a monetary claim for repudiation of an executory contract under §1821(e)(3)(A). On rehearing the First Circuit changed its opinion – but not the result – on the basis of FDIC "internal manual procedures" which FDIC ultimately conceded had been satisfied in the case. *Heno v. FDIC,* 20 F.3d 1204, 1208 (1st Cir. 1994). RTC analogizes its new, 1994 "Interim Statement," which expressly applies to unexpired leases and executory contracts, to FDIC's manual procedures. RTC petition at 9, n.7. The "Interim Statement" does not assist RTC here, for the reasons discussed in Part III, *supra.* In fact, it is clear that had the First Circuit been presented with *this* case it would have fully concurred with the reasoning and result reached by the Tenth Circuit. The *sole* basis for changing its opinion was FDIC's preexisting internal manual procedures containing an implicit interpretation allowing FDIC's administrative processing of a post-takeover claim like Heno's. RTC had no similar statement of procedures when the decision was rendered in this case. Since there was no "Interim Statement" in existence at the time of RTC's appeal, briefing, argument, or the decision on its appeal, presumably the First Circuit would have ruled the same way as the Tenth Circuit – and also presumably would not have changed its opinion because RTC adopted a *subsequent* interpretation directly contrary to the appellate decision.

Finally, the First Circuit's deference to the receiver's views on subject matter jurisdiction of the courts under FIRREA is contrary to settled authority in other

Circuits. *E.g., Parker North American Corp. v. RTC,* 24 F.3d 1145, 1149 (9th Cir. 1994) ("We review *de novo* this jurisdictional question [citation omitted], and 'note at the outset that the question we must resolve is not one on which we owe deference to the [RTC]. Congress did not commit questions of court access . . . to the Corporation.' " The court was quoting from *Office & Professional Employees Int'l Union v. FDIC,* 962 F.2d 63, 65 (D.C. Cir. 1992), relied upon by RTC in its petition here). *Cf., Coit Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.,* 489 U.S. 561, 579-80 (1989) (Courts are guided by congressional intent where a statutory requirement of exhaustion is not explicit, and a court should not defer exercise of jurisdiction under a federal statute unless it is consistent with that intent).[40]

RTC exaggerates from the Tenth Circuit's acknowledgment that its decision conflicts with the Third Circuit's views. Petition at 6 (asserting an acknowledgment of "conflict with decisions in other courts of appeals." (Emphasis supplied.)). The court acknowledged only that a Third Circuit decision conflicted; other decisions cited by RTC and discussed below do not conflict; indeed the RTC represents in its Petition at 10 that the Ninth Circuit disagrees with the Tenth Circuit interpretation notwithstanding that the Ninth Circuit has *approved* the Tenth Circuit's holding in this case. *See Parker North American Corp. v. RTC,* 24 F.3d 1145, 1153 at n.9 and 1154 (9th Cir. 1994).

The Tenth Circuit acknowledged that its decision split with *Rosa v. RTC,* 938 F.2d 383, 392 (3d Cir.) *cert.*

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[40] The Tenth Circuit also cited as analogous authority *RTC v. Midwest Fed. Sav. Bank,* 4 F.3d 1490 (9th Cir. 1993), where the court held that parties "who are not creditors of a failed depository institution and do not receive statutory notice of the requirement of and deadline for filing claims, who have no independent basis for bringing an action against the RTC and against whom the RTC has not brought suit," are not prevented under §1821(d)(13)(D) from raising defenses to RTC's claims by failure to exhaust administrative remedies. *Id.* at 1496-97.

denied, 116 L.Ed.2d 608 (1991). RTC App., 14a. In *Rosa* plaintiffs were participants in an employees' pension plan of a depository institution under RTC's receivership. *Id.* at 388. The plan was transferred to and assumed by a second depository institution under RTC's conservatorship. *Id.* RTC then announced, as receiver of the first institution, that the assumption was unlawful and terminated benefits under the plan retroactively, effective the date of RTC's appointment. *Id.* at 389. Plaintiffs sued RTC in each of its capacities for both of these institutions (and a third one later created to receive the assets of the second). *Id.* at 390.

The court rejected the contention that the jurisdictional bar of §1821(d)(13)(D) did not apply to claims against RTC arising after its appointment as conservator or receiver. *Id.* at 392. The court did not discuss RTC's notices to creditors, if any, or the bar date for presenting creditor claims – the aspect of the claims procedure upon which the Tenth Circuit opinion turns. Thus, while the court's abstract conclusion that post-takeover claims are not exempt from §1821(d)(13)(D) may superficially conflict with the Tenth Circuit's opinion, the issue found critical in this case was never reached in *Rosa:* whether the jurisdictional bar would apply in the event plaintiffs could no longer timely invoke the claims process.

The Third Circuit emphasized that issue in *National Union Fire Ins. v. City Savings, F.S.B.*, 1994 Westlaw 313110 (3rd Cir. 1994), a declaratory judgment action relied upon by RTC in its petition at 10.[41] In *National Union* the court first *rejected* the premise of RTC's statutory interpretation here – that "creditor" represents a narrower class than persons having "claims" (RTC's petition at 8-9). Instead, the court

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[41] *National Union* has not yet been released for publication by the Third Circuit, and the Westlaw opinion is prefaced by notation that the opinion may still be revised or withdrawn.

borrowed from analogous bankruptcy law in defining the terms "claim" and "creditor" under §1821(d) (Westlaw pp. *8-9),[42] and observed: "The term 'creditor' is defined in relevant part as an 'entity that has a claim against the debtor.' " *National Union, supra,* at *9. The court found it unnecessary to decide the further issue of whether a "claim" subject to the administrative claims process was asserted by the declaratory judgment action, because the court found that the same issues could be raised as defenses in an action by RTC in any event. *Id.* Since plaintiff could still obtain effective relief regardless of the applicability of the claims procedure, the court held the action barred under §1821(d)(13)(D). *Id.* at *10. The court contrasted cases where an action asserts a right to *payment,* holding that application of §1821(d)(13)(D) would lead to an unconstitutional result if the claimant could not timely invoke the administrative process — *Id.* at *10-11. This comports with the Tenth Circuit's views. RTC App., 11a.[43]

The Third Circuit did not reject the Tenth Circuit's interpretation in any respect sought to be advanced by RTC in its petition here. The court cited the Tenth Circuit's decision, prefaced by the signal "*cf.*," for the statement that several courts had advanced, "or at least suggested" that the ouster of jurisdiction of §1821(d)(13)(D) "should be limited to suits otherwise governed by the administrative claims procedure set

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[42] *See also Office and Professional Employees Intern. Union, Local 2 v. FDIC,* 962 F.2d 63, 68 (D.C.Cir. 1992) (stating bankruptcy law is a promising source to borrow from in defining terms like "claim," "claimant," and "creditor").

[43] The court in *National Union* noted the decision in *Heno, supra,* interpreting "the administrative claims procedure broadly to allow the receiver to make determinations over a larger class of claims than the plain language of FIRREA might suggest." *National Union, supra* at n.12. The court stated that it appeared RTC could do the same thing. As noted above, RTC did not do so by the time of the Tenth Circuit decision in this case, assuming that it could ever validly narrow federal court jurisdiction by deciding it would entertain a claim otherwise excluded from the claims process.

out in §1821(d)..." *Id.* at *8 and n.8. The court also eschewed a narrow interpretation of the jurisdictional bar out of constitutional concerns applied to future hypothetical cases. *Id.* at *13 and n.21.[44]

Other cases cited by RTC do not even superficially conflict with the Tenth Circuit's holding. *Henderson v. Bank of New England,* 986 F.2d 319 (9th Cir. 1992) was an action asserting both monetary and nonmonetary claims arising from the depository institution's alleged violation of various federal and state statutes more than five years before FDIC was appointed receiver. Plaintiff already possessed the claims involved at the time of FDIC's appointment as receiver.

In fact, the Ninth Circuit has approvingly cited, quoted, and relied upon the Tenth Circuit's holding in this case in its opinion in *Parker North American Corp. v. RTC,* 24 F.3d 1145, 1153 n.9 and 1154 (9th Cir. 1994) (holding preference action in bankruptcy by debtor against depository institution under RTC's receivership was not creditor's claim subject to exhaustion requirement of FIRREA, twice approvingly citing Tenth Circuit's holding for proposition that FIRREA's claims process does not apply to claims relating to RTC's conduct as receiver).

The issue in *Office and Professional Employees Intern. Union, Local 2 v. FDIC,* 962 F.2d 63 (D.C.Cir. 1992) was whether a union had standing to pursue claims under FIRREA for fringe benefits of its members who were discharged upon FDIC's appointment as receiver. *Id.* at 66. The union had timely presented administrative claims for its members. *Id.* at 64 and 66. The court recognized the union's standing to present

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[44] *Praxis Properties v. Colonial Savings Bank, S.L.A.,* 947 F.2d 49, 64 (3rd Cir. 1991), cited by RTC as "dictum" at 10, briefly notes the holding in *Rosa, supra,* in a case where administrative remedies were found to be exhausted under informal procedures in FIRREA's infancy. It adds nothing to *Rosa* or *National Union,* and does not concern issues sought to be raised by RTC here.

administrative claims for the employees, and to bring a court action to enforce the claims when they were denied by FDIC. No issue was presented as to the necessity of exhausting administrative remedies before presenting a post-takeover claim against the receiver arising from its own management decisions.

The issue in *Lloyd v. FDIC*, 22 F.3d 335 (1st Cir. 1994) was *where* a district court action against FDIC had to be filed, not whether it could be filed.[45] Plaintiff's claims for reformation or cancellation of contracts arose from alleged mutual mistake occurring before FDIC was appointed receiver, and there was no question that plaintiff timely presented an administrative claim. *Id.* at 336.

To summarize the state of the purported conflicts between Circuits: It appears that the First Circuit would have ruled the same way as the Tenth Circuit, since it would have had no RTC "Interim Statement" to consider until one was adopted after the decision on appeal. It is uncertain how the Third Circuit would rule if presented with this case in view of its constitutional concerns for depriving courts of jurisdiction over claims for payment which could not be timely processed under FIRREA, as expressed in *National Union Fire Ins., supra.* None of the other Court of Appeals' decisions cited by RTC even superficially conflicts with the Tenth Circuit's holding, and the Ninth Circuit has approved that holding.

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[45] After FDIC failed to allow plaintiff's administrative claim, plaintiff filed an action in Rhode Island state court, which FDIC removed to federal court in the District of Columbia. That court transferred the case to federal district court in Rhode Island, which the First Circuit held lacked jurisdiction under §1821(d)(6)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM 12 U.S.C. §1821

* * *

(d) Powers and duties of Corporation as conservator or receiver

(10) Payment of Claims

(A) In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B) Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment

* * *

(e) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection without a reasonable period following such appointment.

(3) Claims for damages of repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be —

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section

* * *

(5) Leases under which the institution is the lessor

(A) In general

If the conservator or receiver repudiates an unexpired written lease of real property of the insured depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either —

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in possession

If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph —

(i) the lessee —

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository institution under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II).

* * *

(j) Limitation on court action

Except as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or receiver.

APPENDIX B

EXCERPTS FROM PLAINTIFF'S
SECOND AMENDED COMPLAINT

[Filed December 9, 1991]

[RTC Tenth Circuit Appendix 16-31]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 91-1304-K

HOMELAND STORES, INC.,
Plaintiff,

VS.

RESOLUTION TRUST CORPORATION;
AND BOB'S SUPER SAVER, INC.,
Defendants.

SECOND AMENDED COMPLAINT

* * *

2. Defendant Resolution Trust Corporation ("RTC") is created under 12 U.S.C. §1441a, and is either receiver or assignee of (a) Mid Kansas Federal Savings and Loan Association and (b) First Federal Savings and Loan Association of Coffeyville, Kansas (hereafter the "S&Ls"), with respect to the lease which is the subject of this controversy.

* * *

7. The Homeland Lease contains a provision designed to make the Leased Property an attractive site to the lessee by requiring that another specified, compatible tenant lease another substantial area within the shopping center. In particular the Homeland Lease provides in paragraph 20 that the lessor covenants that the lessor will furnish lessee with a copy of a fully executed 20-year lease with T.G.&Y. (the "T.G.&Y. Lease") for a 40,000 square foot area of the

leased premises (the "T.G.&Y. Leased Space") as shown on an exhibit to the Homeland Lease; and that the T.G.&Y. Lease will not be cancelable by lessee except for certain specified reasons set forth in the Homeland Lease. Paragraph 20 of the Homeland Lease requires that the 40,000 square foot area specified on the accompanying exhibit be occupied by T.G.&Y., which is defined as a "principal tenant" therein. The T.G.&Y. Leased Space is the only 40,000 square foot space within the Leased Property available to satisfy the obligations imposed by paragraph 20 of the Homeland Lease, and the Homeland Lease requires the use of the T.G.&Y. Leased Space for the principal tenant as defined therein.

* * *

11. After the vacation of the T.G.&Y. Leased Space by the first tenant to reoccupy that space following T.G.&Y.'s lease cancellation, Homeland learned that RTC was considering, and may have already executed a lease with defendant Bob's Super Saver. RTC did not consult with Homeland or make the required disclosures under paragraph 20 of the Homeland Lease to enable Homeland to determine whether Bob's Super Saver would be an acceptable substitute tenant for that of T.G.&Y. The business of Bob's Super Saver is, like Homeland's, the retail sale of grocery items. Bob's Super Saver is not a "similar" tenant to T.G.&Y. Nor is Bob's Super Saver an "acceptable" substitute tenant to Homeland for that of T.G.&Y.

* * *

13. Homeland has made demand upon defendants that no such lease with Bob's Super Saver be consummated, and that if any such lease has been entered that it be immediately terminated, and that RTC honor its obligations under paragraph 20 of the Homeland Lease. Homeland has learned through discovery that a

lease to Bob's Super Saver was executed, and Homeland has been given no assurance by either defendant that such lease will not be carried out.

* * *

18. Following the initial contacts, Bob's Super Saver prepared and submitted to RTC a proposed lease of the T.G.&Y. Leased Space. Section 2.1 of the proposed lease recited the existence of the lease to Homeland's competing grocery store and required RTC to warrant that the premises were free and clear of any noncompetition restrictions in Homeland's lease or those of other existing tenants of the Shopping Center that would limit Bob's Super Saver's intended use of the premises. This provision also would have required RTC to indemnify Bob's Super Saver against loss or liability resulting from any violation or claim of violation of such restrictive covenants. RTC advised Bob's Super Saver that it could not include these provisions.

19. Bob's Super Saver subsequently prepared and proposed a revised agreement, which became the final lease agreement with RTC dated March 22, 1991 (a copy of which is attached hereto as Exhibit "B".) The provision described in paragraph 18 above was revised to provide that the lease of the T.G.&Y. Leased Space to Bob's Super Saver was not subject to any noncompetition restrictions "except those that are reflected in the pre-existing Shopping Center Lease" with Homeland (as successor to Safeway), which was attached to the Bob's Super Saver lease agreement as an Exhibit.

* * *

21. As additional inducements to RTC to enter into the lease agreement with Bob's Super Saver and to breach its obligations to Homeland, Bob's Super Saver offered and agreed to nearly triple its rent if Homeland vacated the Leased Property during the

first 30 months of Bob's Super Saver's lease agreement and to double the rent if Homeland vacated after the first 30 months and did not compete with Bob's Super Saver within a radius of five miles. Bob's Super Saver also required RTC to agree that it would not lease any other property to Homeland or any other grocer within a radius of five miles of the Belmont Square Shopping Center. Such provisions provide a wrongful and tortious inducement to RTC as lessor to seek to obtain Homeland's removal from the Leased Property and reward RTC for breaching the Homeland Lease.

* * *

PRAYER FOR RELIEF

25. WHEREFORE, Homeland prays for judgment against defendants as follows:

Injunctive Relief

(A) For preliminary and permanent injunctive relief:

(1) enjoining defendants from consummating and/or carrying out any lease for the T.G.&Y. Leased Space constituting the 40,000 square foot area designated in the Homeland Lease, paragraph 20 and Exhibit "A" thereto;

(2) directing RTC to furnish Homeland with the information required under paragraph 20 of the Homeland Lease, including (a) fully executed copies of all leases and amendments thereto with each tenant which has occupied the space formerly occupied by T.G.&Y. for the T.G.&Y. Leased Space, and the prospective lease of any lessee considered for such space in the future, and (b) the information showing the reasons for cancellation of the lease of any principal tenant, whether already having occurred or occurring hereafter;

(3) enjoining RTC from entering into any lease with any tenant for the T.G.&Y. Leased Space without first having ascertained from Homeland that such tenant is deemed a similar tenant which is acceptable to Homeland for such Leased Space;

(4) enjoining and/or ordering specific performance of RTC's obligation to repair the parking area as required under paragraph 4 of the Homeland Lease;

(5) enjoining Bob's Super Saver from interfering with Homeland's Lease and business expectancy and from offering or consummating any consideration or inducement to RTC to eliminate Homeland as a Lessee of RTC.

Damages

(B)(1) For damages from RTC in the amount of all rent paid by Homeland for those months in which the T.G.&Y. Leased Space has not been occupied by a lessee which is similar to T.G.&Y. and acceptable to Homeland, and whose store has been open to the general public for business;

(2) For damages from RTC in an amount which will compensate Homeland for its losses due to the breach of RTC's obligation to keep the common areas at the Belmont Square Shopping Center in good repair.

(C) For cancellation of any lease now in effect between Bob's Super Saver and RTC;

(D) For actual and punitive damages against Bob's Super Saver in excess of $50,000;

(E) For reasonable attorney's fees and costs reasonably expended by Homeland in the prosecution of this action;

(F) For all other relief, legal or equitable, which the Court may determine to be warranted under the circumstances demonstrated by Homeland in this case.

Respectfully submitted,

/s/ James D. Oliver (8604)

-Of the Firm-

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-AND-

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Attorneys for Homeland Stores, Inc.

APPENDIX C

AFFIDAVIT ATTACHED TO RESOLUTION TRUST CORPORATION'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

[Filed October 23, 1991]

[RTC Tenth Circuit Appendix 13-15]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 91-1304-T

HOMELAND STORES, INC.,
Plaintiff,

VS.

RESOLUTION TRUST CORPORATION,
AND BOB'S SUPER SAVER, INC.,
Defendants.

AFFIDAVIT

STATE OF KANSAS, COUNTY OF SEDGWICK ss:

I, Jess Wm. Foster, of legal age and being first duly sworn upon my oath, state:

1. I am the Managing Agent of Mid Kansas Federal Savings and Loan Association of Wichita ("Mid Kansas Federal"), in Receivership and Managing Agent of Mid Kansas Savings and Loan, F.A. Wichita, Kansas, in Receivership.

2. On October 19, 1989, Mid Kansas Federal was place into a receivership by Resolution #89-307 of the Office of Thrift Supervision with Resolution Trust Corporation ("RTC") being appointed as the Receiver for Mid Kansas Federal.

3. On October 19, 1989, a new association was formed named Mid Kansas Savings and Loan Associa-

tion, F.A., Wichita, Kansas ("Mid Kansas Savings"), a Federal Savings and Loan Association, where the majority of the liabilities and all of the assets of Mid Kansas Federal were conveyed to Mid Kansas Savings pursuant to a Purchase and Assumption Agreement.

4. On October 19, 1989, pursuant to Order No. 89-309, the Office of Thrift Supervision declared Mid Kansas Savings to be insolvent and placed it into a conservatorship with RTC being appointed as the Conservator.

5. On October 27, 1989, November 24, 1989, and December 22, 1989, Mid Kansas Federal through its receiver RTC caused a notice to creditors to be published.

6. On February 15, 1991, Mid Kansas Savings was placed into a receivership with RTC being appointed as the Receiver.

7. On February 19, 1991, March 19, 1991 and April 19, 1991, Mid Kansas Savings through its receiver RTC caused a notice to creditors to be published.

8. As of this date, no claim against Mid Kansas Federal, Mid Kansas Savings or RTC as receiver thereof has been received from Homeland Stores, Inc.

9. On August 18, 1989, First Federal Savings and Loan Association of Coffeyville ("First Federal") was placed into a receivership of Order #89-53 of the Office of Thrift Supervision with RTC being appointed as receiver of First Federal.

10. On August 22, 1989, September 22, 1989, and October 23, 1989, First Federal by and through its receiver RTC caused a notice to creditors to be published.

11. As of this date, no claim against First Federal or its receiver RTC has been received from Homeland Stores, Inc.

FURTHER AFFIANT SAITH NAUGHT.

/s/ Jess Wm. Foster

SUBSCRIBED AND SWORN TO before me this 22nd day of October, 1991, by Jess Wm. Foster.

(SEAL) /s/ Joyce J. Meyer
Notary Public

My Appointment Expires
December 18, 1993